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Seventieth session (second part)

Provisional summary record of the 3422nd meeting
Held at the Palais des Nations, Geneva, on Thursday, 5 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al Marri
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Commemoration of the seventieth anniversary of the Commission (agenda item 11) (*continued*)

Seventy Years of the International Law Commission: A Solemn Meeting

The Chair said that the current solemn meeting was the second to be held in commemoration of the Commission's seventieth anniversary, the first having taken place at United Nations Headquarters in New York in May.

Mr. Manley Hudson, following his election as the first Chair of the Commission on 12 April 1949, had referred to history as the driving force behind the Commission's work, noting that it was impossible for a jurist to "forget the lessons of history". In his view, the Commission must take into consideration the many gradual achievements of the past, while recognizing that history was in perpetual motion and that Commission members must not be slaves of the past. Speaking in 1949, he had clearly been referring to the ravages of the two world wars and the international community's failure to fulfil its promise to secure a lasting and stable peace. It was against that backdrop that the international community had set about honouring that unfulfilled promise through the maintenance and advancement of international law. As the title of the event, "Drawing a Balance for the Future", suggested, examining and learning from the past was an effective way of creating a better future. The Commission had been established to do just that, by assisting the General Assembly, under article 13 (1) of the Charter of the United Nations, to initiate studies and make recommendations to encourage the progressive development of international law and its codification.

Over the years, the Commission's work to progressively develop and codify international law, which had given rise to many multilateral treaties, had remained as relevant as ever and continued to be a valuable source of reference for international jurists. Indeed, the members of the Commission often referred back to the opinions expressed by their predecessors from the 1950s onwards in their search for better solutions for the future.

The codification process, by its very nature, was often lengthy. Although article 15 of the Commission's statute drew a distinction, for the sake of convenience, between the concepts of the progressive development and the codification of international law, in practice, the Commission's work on a given subject often involved both, with the balance struck between them varying according to the subject in question. In the context of the United Nations Decade of International Law, it had been pointed out that the progressive development and codification of international law, despite the distinction drawn in article 15 of the statute, appeared to have merged into a broader concept of codification, which was no longer simply viewed as the transposition of unwritten law into written law. That broader concept of codification, in turn, was closely linked to the observation that the final form of the Commission's work, whether stand-alone articles that would become part of a convention, draft guidelines, conclusions and principles, or a simple report, could perhaps be less important for the future than the complex process of codification and progressive development itself.

While the ultimate goal of all the Commission's work on a given topic was traditionally considered to be the development of a binding international treaty, recent experience had shown that not always to be the case. Some of the most authoritative and frequently invoked texts that had emerged from the Commission's work had not in fact become multilateral treaties. However, the fact that a final text for codification could take one of several forms did not mean that treaties had become obsolete instruments. Indeed, building a better future often required international consensus in treaty-making and, on occasion, the establishment of institutions or the harmonization of national laws through binding common rules. It was therefore highly significant that in 2016 the Commission had decided to recommend to the General Assembly the elaboration of multilateral treaty on the basis of the draft articles on the protection of persons in the event of disasters, and it was hoped that would also be the case in 2019 for the final text on crimes against humanity. Both texts had the potential to become treaties of great historical importance that would help secure the desired future of the international legal system.

The authoritative role of the Commission and the relevance of its output, even when it did not become a multilateral treaty, were attributable to the widespread recognition of the intellectual prowess of its members, past and present. Despite, or even owing to, their plurality, diversity and sometimes divergence, they had all helped the Commission find its collegiate voice. The Commission's working methods had been designed to ensure that its final product was always greater than the sum of its parts. The interplay between the balanced geographical distribution and the different legal traditions and systems represented in the composition of the Commission's membership was essential in that regard, as was the independence of individual members of their respective Governments. The prominent role played by the Commission's Secretariat, whose preparatory studies and substantive legal assistance were crucial to its proper functioning, had also proved essential. Except on a handful of occasions, the Commission had always met and conducted its substantive work in Geneva. The Commission was deeply grateful to the Government of the host State for its generous support over the years. The Commission likewise wished to thank the United Nations Office at Geneva, in particular its library and conference services staff, for its continued cooperation, which was vital for the smooth running of the Commission's annual meetings.

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs and United Nations, the Legal Counsel) said that, during the earlier commemoration held on 21 May 2018 in New York, he had recalled that the International Law Commission had held its first session in Lake Success, New York, in 1949. It therefore seemed appropriate to add that the Commission's predecessor had met at the Palais des Nations in Geneva 25 years earlier. Indeed, on 12 December 1924, the Council of the League of Nations had established the Committee on the Progressive Development of International Law and its Codification in the very room in which the current meeting was being held.

Like the members of the Commission, the members of the Committee had served in their personal capacity and had, as a whole, represented the main forms of civilization and the principal legal systems of the world. The commemorative meeting provided an opportunity to pay tribute to the achievements of the Commission over the past 70 years and to honour the efforts of those who had laboured for the ideal of the progressive development and codification of international law prior to its establishment.

Over the years, Geneva had remained at the heart of codification efforts. The successes of the Commission over seven decades could be ascribed, in part, to the unrivalled facilities of the Palais des Nations, and to the generous hospitality of Switzerland, its host country. Removed, though not isolated from the dynamics of New York, Geneva had proven highly conducive to the serious study of and debate on complex questions of international law. It was only fitting that the Commission should retain its seat in Geneva, where the first organized international efforts to codify and progressively develop international law had started almost a century before.

Echoing the words of his erstwhile predecessor, Mr. Ivan Kerno, pronounced at the Commission's very first session, he recalled that international law ought to serve as a shelter to mankind and that only under its protective roof could the States Members of the United Nations find the international peace which the Organization had been established to ensure and maintain. The framers of the Charter of the United Nations had affirmed the central role of international law in the architecture of peaceful relations between States, a role which had not changed more than seven decades later. The Commission remained at the centre of efforts to develop and strengthen the international legal order. It was to be hoped that international law would continue to provide a shelter to mankind in the years to come.

Ms. Cicéron Bühler (Federal Department of Foreign Affairs, Switzerland), speaking as the representative of the host State for the Commission's annual sessions, said that international power relations were changing against a backdrop of globalization and fragmentation. While international relations had taken on greater importance, they had also become more complex. Far from having had its day, international law continued to play a fundamental role in relations between States. Indeed, its progressive development and codification was the key to maintaining a stable, just and peaceful international order, particularly in a world that was undergoing a period of upheaval.

As a small, but highly interconnected State, Switzerland had a keen interest in maintaining and strengthening international law. The strengthening of international law was not only a fundamental element of the Charter of the United Nations but also of Swiss foreign policy. No country or actor on the international scene could find the answers to contemporary challenges alone. The same was true of questions of law, which was why the work of the Commission was so important.

The Commission continued to work on questions of general international law, such as the law of treaties and the immunity of State officials, and contemporary problems, such as the protection of the atmosphere, the protection of the environment in relation to armed conflicts and the protection of persons in the event of disasters. The Commission was also called upon to oversee the progressive development of new norms designed to address modern-day challenges. The relevance and effectiveness of international law would only increase in the future.

The value of the Commission's work was well established, as its draft articles were considered highly authoritative in practice and were often interpreted as statements of law by national courts. It was therefore a great honour for Switzerland to host the Commission in Geneva and, in so doing, to contribute to its important work. As had been recalled by Ambassador Jürg Lauber at the first solemn meeting in New York, holding the Commission's meetings in Geneva ensured its complete independence from the Sixth Committee, whose work was also greatly appreciated by Switzerland. The differing legal cultures of the two bodies benefited international law, while the Commission's presence in Geneva encouraged synergies with numerous Geneva-based international organizations and international actors.

It was critical for international law to be promoted not only from United Nations Headquarters in New York, but also from Geneva. In that connection, she drew attention to the International Law Seminar held in Geneva each year, which enabled students, professors and officials to learn about the Commission's work. She wished to assure those present that Switzerland remained committed to supporting the work of the Commission and to taking the steps necessary to ensure that its members were able to work in an environment favourable to the proper conduct of its work.

Ms. Gilmore (United Nations Deputy High Commissioner for Human Rights) said that, founded seven decades previously in the aftermath of war, the International Law Commission was coincident in genesis with the Universal Declaration of Human Rights and had played a leading role in progressively developing and codifying the international legal rules that underpinned efforts to defend its values. Since then, the Commission had worked to ensure that access to justice was universal and not determined by place of birth, skin colour, gender or any other identity and that those who inflicted injury or should have prevented it were held to account.

The Commission was to be commended for its enormous contribution to the development of international law in the field of State responsibility and for having helped pave the way for the establishment of the International Criminal Court. The Office of the United Nations High Commissioner for Human Rights (OHCHR) highly valued the Commission's work, which had proven essential for the fulfilment of the panoply of mandates within the United Nations human rights system. Members of treaty bodies, independent experts and special rapporteurs alike had all made reference to the legal norms that the Commission had so expertly crafted. OHCHR was seeking to extend their application as it worked to fulfil the promise of the Universal Declaration of Human Rights, address gaps in human rights protection and help States and civil society to develop the capacity to provide that protection.

Despite the prohibition of crimes against humanity being clearly established and widely recognized within the international community, such crimes remained a daily reality in contexts of conflict, crisis and State collapse. Against that backdrop, the Commission's work on a draft convention on crimes against humanity had never carried more importance or held deeper promise, particularly for OHCHR-led commissions of inquiry and fact-finding missions for the investigation of grave violations of international human rights law and international humanitarian law.

She urged the Commission to maintain its momentum, as there was a great need for its work on the harmonization of domestic legal frameworks with international norms on crimes against humanity, the inclusion of the non-applicability of statutes of limitations for such crimes, the universal application and non-derogability of those obligations, even under exceptional circumstances, and the immunity of State officials from foreign criminal jurisdiction.

OHCHR would continue to cooperate with the Commission, the wider international human rights system and all those who looked to the law as a means of upholding human rights. She hoped that equality before the law and the rule of law could be extended further so as to protect all those persons whose rights were under threat or had been violated.

A musical interlude took place, in which the Arlequin Trio performed Cinq pièces en trio *by Jacques Ibert.*

Mr. Yusuf (President of the International Court of Justice) said that the work of the International Law Commission had played and continued to play a crucial role in the daily work of many international jurists and had ensured the continued development of the international legal system. In order to draw a balance for the future, it was necessary to examine how the Commission had fulfilled its mandate in the light of the changes to the structure and composition of the international community over the past seventy years and how successful it had been in facilitating the adaptation of existing international legal norms to the changing international context.

Whereas the mandate and work of the Commission's predecessor, the Committee on the Progressive Development of International Law and its Codification, had been limited by the restrictive nineteenth century conception of international law that was prevalent at that time, by the time the Commission had been established in 1947, the world had undergone dramatic changes. The adoption of the Atlantic Charter and the Charter of the United Nations in 1941 and 1945, respectively, had laid the foundation for a new international legal system with universalist aspirations, centred around the principles of equal rights, the self-determination of peoples and the protection of human rights.

The new norms adopted by the Commission had been enriched by the views and positions articulated by newly independent States in the outcome document of the Asia-Africa Conference held in Bandung, Indonesia, in 1955 and in the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted as General Assembly resolution 1514 in 1960. The gradual growth in the membership of the United Nations following the Commission's establishment was attributable to a profound societal change, which had led to the emergence of a diverse body of actors, each with their own culture, customs and legal traditions. It was against the backdrop of decolonization that the Commission had recognized the need to modify its existing approach to codifying customary international law to take into account the views, perspectives and legal systems of new States, pursuant to article 8 of its statute, and had begun to view the progressive development and codification of international law as two parts of the same whole. Thus, the Commission's work was no longer limited to the systematization of practices and usages, some of which could well have been out of tune with new international realities.

It was not paradoxical to claim that the universality of international law depended on diversity. Indeed, achieving its universalization entailed borrowing and adapting concepts and principles from different legal traditions. Moreover, the legitimacy of international law depended to a great extent on having the ability to represent diverse legal traditions. The Commission's endeavours were characterized by a willingness to reflect the views of the entire international community and an openness to diverse perspectives. For example, it had taken due account of the concerns raised by newly independent States and the General Assembly in its work on the law of treaties through the inclusion of provisions on the invalidity of treaties whose conclusion had been procured through threat or the use of force and in its work on the succession of States in respect of treaties, in which the related Nyerere doctrine and the principle of self-determination were duly reflected. The Commission was likewise to be commended for having included the concept of peremptory norms of general international law (*jus cogens*) in its work on the law of treaties and for its work on the succession of States in respect of matters other than treaties, insofar as it

explicitly acknowledged the principle of permanent sovereignty of natural resources, which was of great importance to developing States.

The Commission's work had clearly shown that legal norms could be adapted to societal change and had led to an increase in the number of international norms recognized by all members of the international community. Furthermore, the Commission had succeeded in shifting the principal source of law-making from custom to multilateral conventions and a codified set of rules in certain fields. However, while certain elements of the Commission's work — for example, article 33 (2) of its articles on responsibility of States for internationally wrongful acts — recognized the ability of individuals to hold rights under international law, it had only acknowledged, as a recommended practice under its draft articles on diplomatic protection, that reparation should accrue directly to an individual when his or her rights had been violated. The Commission should take steps to remedy that situation.

The future held even greater challenges for the Commission and the international legal system as a whole. Recent developments showed that the most fundamental rules and principles of international law were being threatened by those wishing to abandon multilateralism in favour of unilateralism. The sanctity of treaties and the very principle of *pacta sunt servanda* were likewise being put to the test as a result of a growing tendency to repudiate international treaty commitments almost immediately. Such attempts to render agreements among States less durable and more fragile was a threat to the international rule of law. To equate a change of government or ruling political party to the doctrine of *rebus sic stantibus* also posed a threat to the rule of law and to its predictability and stability. The Commission must respond to those threats by continuing to promote multilateralism and inclusiveness and by raising awareness among Governments of the importance of such concepts for international law and the international rule of law. It should also continue to promote proper observance of the rules of international law in the interest of humanity as a whole and to disseminate the message that the well-being and progress of all nations depended on multilateral cooperation based on the rule of law and that shared values and common rules were the key to achieving peace and harmony among nations.

The Chair, in drawing the solemn meeting to a close, thanked Mr. Yusuf for his eloquent and courageous statement and said that it had served as a helpful reminder of the Commission's past achievements, the current circumstances in which the international community found itself and the work that the Commission needed to do to meet the challenges of the twenty-first century.

Panel 1: The Commission and its impact

The Chair invited Mr. Nolte to introduce the panel discussion.

Mr. Nolte (International Law Commission), moderator, said that the panel discussions were a fundamental feature of the events to mark the seventieth anniversary of the Commission, as they were central to the aim of "drawing a balance for the future", which entailed not only commemorating the anniversary, but also reflecting on how to prepare the Commission for future challenges, some of which might be rooted in the present.

The sixtieth anniversary celebrations had been more low-key and had not given rise to an official anniversary publication. They had been held against a backdrop of a sense of stagnation and a crisis of self-confidence in the Commission, encapsulated in an academic article by Christian Tomuschat entitled "*The International Law Commission: An Outdated Institution?*", in which the author had expressed scepticism about the Commission's future role and wondered what work was left to be done, since the Commission had, in his view, progressively developed and successfully codified the major general rules of international law.

The current situation was completely different. The Commission was dealing with a large number of important topics at a more rapid pace than ever before. The number of new topics which had been proposed actually exceeded its capacity. There was a higher rate of participation in the Drafting Committee and an unprecedented number of young people were interested in working as assistants to the members.

One of the purposes of the colloquium was to have the Commission's state of health checked by recognized experts, in other words renowned academics whose findings would then be discussed by the legal advisers of States and international organizations.

The panel discussions should produce lasting impetus which would enhance and safeguard the Commission's unique function of progressively developing and codifying international law. A report of the panel discussions would be produced and presented during the International Law Week in New York in 2018 and speakers' written contributions and the proceedings would be published in book form as a reference point for a wider debate about the Commission's performance in fulfilling its mandate.

There were, of course, limits to the Commission's capacity. The current turbulence on the international political scene might bode ill for the progressive development and codification of international law and might affect the Commission directly or indirectly. States, courts, international organizations or other actors might not be receptive to the increased activity of the Commission. The only way that the Commission could respond to those challenges to the international rule of law was to base its work on authoritative sources, to present its work in a transparent and well-argued fashion and to maintain its cohesion in order to remind States and other actors that there was a common basis on which peaceful and fruitful international relations needed to be conducted in everyone's common interest.

The five panels would focus on questions of immediate interest to the Commission, but each of the topics was affected by broader political and other developments. The subject of the first panel — "The Commission and its impact" — called for consideration of the Commission's role in relation to its addressees and international law as a whole. The second panel — "The working methods of the Commission" — concentrated more on technical matters, but working methods might well be mirrors or symptoms of more general policy or developments. The third panel — "The function of the Commission: How much identifying existing law, how much proposing new law" — addressed a classic question which had acquired greater significance, given that the products of the Commission's work were more frequently used by national and regional courts than they had been in the past. The fourth panel — "The changing landscape of international law" — was also concerned with matters which were high on the Commission's current agenda, namely how to determine the priority of the multitude of areas where the Commission could possibly contribute. The title of the fifth panel — "The authority and the membership of the Commission" — might suggest that there was a connection between the Commission's authority and its membership, but panellists were obviously free to question whether and to what extent that was the case

The Chair invited Mr. Comissário Afonso to introduce and moderate the panel discussion on the Commission and its impact.

Mr. Comissário Afonso (former member of the International Law Commission), moderator, said that the celebration of the seventieth anniversary of the International Law Commission was a momentous event. It was an opportunity to reflect on the centrality of international law to current international relations. The participants in the celebration came from different backgrounds and walks of life. Those who had followed law and diplomacy for many years had been able to draw an obvious lesson from the Charter of the United Nations, namely that even sovereign States needed law internally in order to function properly and at the international level in order to coexist and cooperate with other sovereign States. For that reason, international law was an important source of international order and justice, as had been shown very clearly in a book entitled *Peace through International Law. The Role of the International Law Commission*, edited by Georg Nolte, which had been published at the time of the sixtieth anniversary of the International Law Commission. Many of the insights and conclusions from that book were still relevant. The world would continue to need the International Law Commission for many years to come, as it was central to the international rule of law.

Mr. Rodiles (Mexico Autonomous Institute of Technology (ITAM)), panellist, said that there were many different possible approaches to understanding the impact of the Commission's work on international law. The numerous references by diverse legal entities

to its draft articles, guidelines and conclusions testified to the Commission's authority as a body that generated international law, including in the form of soft law and international standards. Furthermore the fact that international courts, quasi-judicial bodies and arbitration tribunals made great use of the articles on responsibility of States for internationally wrongful acts in a number of areas such as bilateral or multilateral investment agreements, was an indication of the Commission's importance for the long-term development of case law. Domestic courts throughout the world also used the Commission's products in some specific circumstances, and those products likewise had an impact on domestic law in many regions.

The Commission had a hand in inculcating a knowledge of international law. After the earthquake in Mexico in 2017, he had found from a survey conducted by his students that the draft articles on the protection of persons in the event of disasters had had a real impact in disseminating knowledge of existing soft-law standards that could promote a better response to natural disasters. That study had also demonstrated the relevance of international law for the everyday lives of real people.

Turning to the impact of the composition of the Commission and its institutional environment, he agreed that international law was undergoing a radical transformation. Although more matters were being regulated by international law, the main issue was how to ensure that a traditional body operating within a set institutional framework could have an impact despite the structural shifts that were taking place within the international law system. The crux of the matter was not so much that new sectors were being regulated, but that the methods for creating new international legal norms were changing. Perhaps that was why Neil Walker in his book *Intimations of Global Law* had suggested that there was a need for trend-spotting within different normative tendencies. However, the Commission's composition, methods of work and institutional framework were such that, if it were to engage in trend-spotting, it would forfeit some of its legitimacy. He wondered how the Commission could meet the challenge of those developments without losing the authority deriving from its institutional history, or becoming irrelevant. In the written text which he had submitted he had been inspired by an article by Mathias Forteau, which had also focused on those new trends and in which the author had argued that it was necessary to understand international comparative law from within the system and to restate international law. Hence it was vital to understand those normative tendencies from a systemic viewpoint and to examine the legal effects of and interaction between various normative regimes, not forgetting informal normative regimes.

The Commission's study of the fragmentation of international law provided some insight into how to deal with the nexus of regimes, for example when developments in treaties between States had repercussions elsewhere. Mr. Gómez-Robledo's work was highly relevant to issues arising from the provisional application of treaties, for example when an informal coalition of States parties called for the gradual application of measures which had not yet entered into force. Mr. Nolte's research into subsequent agreements and subsequent practice in relation to the interpretation of treaties explained the process whereby developments in formal and informal regimes could be classed as subsequent practice. Indeed, the substantial amount of work done by the Commission in determining what amounted to subsequent agreements and subsequent practice provided a conceptual framework for understanding how the law of treaties was changing. That elucidatory function of the Commission could lead to a restatement of international law and might enable it to counter the risk of treaty fatigue. It could not, however, reverse new trends and return to a previous golden era of codification.

The Commission had often been criticised for restating various aspects of the law of treaties or of customary international law, yet that work offered the potential for giving the Commission the requisite resilience within the new international law environment and might explain the resilience of international law itself. The Commission's topics were not purely academic issues for purists. Max Weber had demonstrated that law was a legal power system which was essential for the rule of law, transparency, predictability and fair participation in the international community. The Commission's work was part of a struggle to uphold the ideals of the rule of law in the modern world.

Ms. Boisson de Chazournes (University of Geneva), panellist, said that, although on some occasions the bell had tolled for the Commission, everyone had to acknowledge that it constituted an invaluable mechanism enabling the international community to clarify and develop the rules of international law. The Commission's achievements over the previous 70 years had been remarkable in many respects and had laid a sound foundation for the contemporary legal order. The time had, however, come to take a realistic look at the future.

While the impact of the Commission's work was most often felt in relation to the law of treaties, that work took different forms in accordance with article 23 of the Commission's statute; the Commission had adopted draft treaties, draft articles, resolutions, guides and reports, all of which had had an impact on the normativity of the international legal order. In that context, a distinction had to be drawn between hard law, in other words treaties which had entered into force, and soft law which encompassed many different kinds of instruments. It might therefore be useful to look more closely at soft law as a source of international law as, even though normativity was usually associated with the binding nature of a text which was intended to have legal effects, a non-binding legal instrument also produced legal effects which, though different to those of a treaty which had entered into force, made it possible to reconcile differing legal tendencies and interests and thereby gradually pave the way for the adoption of a norm of international law. Soft law was also an important source of inspiration for States when they adopted national or transnational laws.

Treaties nonetheless remained the principal task of the Commission and they still provided legal certainty and predictability. The Commission's consideration of 41 topics had led to the adoption of 23 treaties, 19 of which had entered into force. Out of those 19 treaties, 7 had been ratified by at least 40 parties. That quantitative approach nonetheless gave a distorted view of the real situation, since the content of those treaties formed the keystone of the international legal order. In the previous 20 years, only two conventions had resulted from the Commission's deliberations, namely the Convention on the Law of the Non-navigational Uses of International Watercourses of 1997 and the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, neither of which had entered into force. Although that situation might seem to suggest that the era of treaty-making was over, that was not really the case as the Commission was currently engaged in work on two topics which might culminate in a convention.

The lack of appetite for international multilateral treaty-making, or treaty fatigue, had to be taken into account. Treaties had played a very important role after 1945 in building the international legal order, in the sixties for making the international legal order more inclusive, during the Cold War for establishing common rules and after the fall of the Berlin Wall for building a new legal, political and economic order. Since then, new normative trends had emerged. States apparently preferred declarations adopted at the end of summits and memorandums of understanding, although it was unclear to what extent the latter were binding. While little of the Commission's more recent work had led to the adoption of international treaties, it had drafted some texts which were of major importance. They included the articles on responsibility of States for internationally wrongful acts, the draft statute for an international criminal court, which had acted as a catalyst for the adoption of the Rome Statute, and the draft articles on the law of transboundary aquifers, to which many Arab and African States made frequent reference. It could therefore be said that the form of the Commission's work had little bearing on its impact.

The value of its work depended on the regard in which other entities held it. The International Court of Justice, with which the Commission entertained a very close relationship, played the lead role in that context. The Court paid little attention to the form of the instrument to which it referred and sometimes even disregarded the distinction between *lex lata* and *lex ferenda*. On the other hand, some international courts, whose judgments strayed somewhat from the Commission's thinking, should give greater heed to the content of the reports adopted by the Commission. That was true of the European Court of Human Rights in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* in relation to the draft articles on the responsibility of international organizations

and also of the way in which many investment tribunals construed the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.

It was interesting to note that other users of the Commission's work, such as legal advisers, negotiators of international agreements, diplomats, international organizations and civil society associations, looked not only at the final product but also at the reports of the Special Rapporteurs and working groups, which functioned as the encyclopaedia of international practice for all those actors when they had to identify the applicable rules.

In conclusion, it could be said that the Commission had authority and other actors deferred to it. That authority rested *inter alia* on the fact that it was the only universal body that contributed to the development of international law. The Commission could do so only if its work was supported by States in both the short and the long term. In the long term, it would be wise to reflect on the new forms of normativity in the international legal order.

Mr. Šturma (International Law Commission), panellist, noting the references to a golden era of codification, said that there was no denying that the most important codification conventions had been adopted in the 1960s. It was equally true that States were currently less interested in acceding to binding treaties. The Commission therefore had to explore innovative methods of work when tackling new topics. He concurred that the authority of the Commission's products did not necessarily depend on their binding nature; even soft law, including draft articles, or conventions which had not yet entered into force, might serve the needs of the international community. For example, the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts had proved useful when some central European States had had to contend with those issues.

Mr. Rodiles had rightly referred to the Commission's study of the fragmentation of international law, which was one of the Commission's most important achievements. At the same time, the Commission should not neglect more traditional topics.

Another interesting question was whether the Commission should adopt a different approach in response to the latest trends in academia and in the real world of international law. The Commission could indeed look at the many new schools of thought and monitor developments. It also had to bear in mind States' preference for informal instruments. However, it should adapt to that new situation only up to a certain point. Of course, in the context of the topic for which he was Special Rapporteur, namely succession of States in respect of State responsibility, he was aware of the interesting research project concerning shared responsibility conducted by the Amsterdam Center for International Law, which might be helpful when the Commission considered divided or shared responsibility in situations of succession.

Ms. Boisson de Chazournes had raised the extremely relevant point of how the Commission was regarded by others. When reflecting on traditional and modern approaches, it was essential to remember the Commission's identity, audience and language. He still believed that the Commission was part of the invisible college of international law. It was not an intergovernmental body or the bar of the International Court of Justice. However, because the members were elected by the General Assembly, the Commission must speak to a variety of actors, including States through the Sixth Committee, international courts and academia. That made its task quite difficult. The Commission might take up new topics and enter into uncharted waters, but at the same time it must endeavour to be understood by different actors. That was precisely the reason why it should cleave to the more old-fashioned language of international law.

Mr. Comissário Afonso (former member of the International Law Commission), moderator, invited the participants to put questions to the panellists.

Mr. Alabrune (Ministry of Foreign Affairs, France) said that the role played by States with respect to the Commission's products differed greatly depending on whether the latter were treaties or soft-law instruments. Treaties required negotiation between States and then, possibly, ratification. Governments and, in most States, parliaments were therefore involved in the process. That difference should be borne in mind by the Commission, since, even if conventions were not always ratified, they called for

commitment by States and therefore the relationship with the rule of law was dissimilar to that in the case of softer norms. Conventions were therefore clearly in the interest of States.

Mr. Figueredo Corrales (Ministry of Foreign Affairs, Paraguay) said that he wished to pay tribute to the fruitful work done by the Commission over the previous 70 years. Roberto Ago, Hersch Lauterpacht, Eduardo Jiménez de Aréchaga and many other leading jurists had contributed to the great codification exercise in the 1960s. The Vienna Convention on the Law of Treaties and the Vienna Conventions on diplomatic and consular relations had been some of the milestones in its work and, at the time, had been topics of the utmost relevance. The Commission's current modernization exercise mirrored the real world and might lead to further multilateral treaties or the approval of draft articles. The fact that the preamble to the Guarani Aquifer Agreement, which had been drafted two years after the adoption of the draft articles on the law of transboundary aquifers in the Commission, actually mentioned the latter draft articles reflected the extent to which the Commission's work had helped to develop hard law and had acted as a guide and benchmark for legal theory. States therefore owed the Commission a very great deal, because, without its guidance and leadership, they would be stumbling along in the dark. The draft statute for an international criminal court had become the Rome Statute and a virtually universal instrument. His own Government had recently promulgated legislation to implement the provisions of the Statute.

Mr. Abi-Saab (Graduate Institute of International and Development Studies, Geneva) said that, when he had been an international law student in the 1950s, the only available reference material had been common law or recondite legal theory. The Commission had played a very important role in transforming the main body of international law into written law. Dealing with written law was a very different prospect, irrespective of whether that law was binding, as it was possible to consult universal forward-looking texts instead of poring over general abstract theory or sifting through cases in order to extract a general rule.

Mr. Loko (Director of Legal Affairs (retired), Ministry of Foreign Affairs, Benin) said that he had the impression that speakers were tiptoeing around the issues. He wondered whether, when discussing the impact of the Commission's work and given that international politics had implications for all the peoples of the world, it was not necessary to bear in mind the challenges related to the rule of law stemming from the fragmentation of international law.

Mr. Rodiles (Mexico Autonomous Institute of Technology (ITAM)), panellist, replying to the last question, said that the global normative trends which he had mentioned in his statement were not academic inventions but indeed reflected the current practice of both new and traditional players, in other words States and international organizations, which were no longer behaving in the way they had always done in the past. The greatest challenge to the Commission lay in ensuring that it retained its normative authority and its capacity to generate international law. It therefore had to continue to think rationally, respect the institutional framework within which it operated and preserve its methods of work, while not losing any of its relevance. Hence its work to restate international law was crucial. He regretted that the Commission was no longer in its codification heyday, but it could not ignore treaty fatigue. On the other hand, its current consideration of systemic questions related to secondary law was helping to shed light on those new global normative trends and furthered the values and ideals of the rule of law, such as predictability, fair participation and transparency.

Ms. Boisson de Chazournes (University of Geneva), replying to the comments by Mr. Alabrune, said treaties were a valuable means of consolidating the international legal order, precisely because States and national parliaments could have their say during their negotiation. In view of the current situation, account had to be taken of the fact that States had other means of asserting their viewpoint. An instrument which was not binding in itself, but which codified international law, such as the articles on responsibility of States for internationally wrongful acts, was extremely important for the international community. Much of the Commission's current work consisted in the clarification or progressive development of rules contained in conventions which had been proposed by the Commission. It was true that those instruments would not be submitted to a negotiation

conference or to national parliaments. They were however forwarded to the Member States for comment, at which juncture they could express their viewpoints. The Sixth Committee then had its role to play. The Commission's authority inherently depended on its close links with that Committee and the latter's reactions. She hoped that further multilateral treaties would be negotiated by the Commission and that the Commission would think about finding a more democratic and stronger political basis for its work in the international community.

Mr. Šturma (International Law Commission), panellist, said that he agreed that the preparation of draft conventions and non-binding instruments entailed different processes. The crucial point was that the Commission should foster the authority of international law in a variety of ways. It could draw up a statement of law or draft articles of future conventions. If States asked the Commission to prepare a convention, it would be pleased to oblige, although it realized that it would then be up to States to negotiate and adopt the final text, since it lay with States to determine the final form of the Commission's work.

Mr. Comissário Afonso (former member of the International Law Commission), moderator, said that he wished to thank the panellists for their excellent presentations.

The meeting rose at 1.05 p.m.